

FEDERAL ELECTION COMMISSION  
999 E Street, N.W.  
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

MUR: 6717

DATE COMPLAINT FILED: 2/01/2013

DATE OF NOTIFICATION: 2/06/2013

LAST RESPONSE RECEIVED: 8/13/2013

DATE ACTIVATED: 9/27/2013

ELECTION CYCLE: 2012

EXPIRATION OF SOL: 4/12/2017 to 8/02/2017

COMPLAINANT:

Daniel Epstein, Executive Director, Cause of Action

RESPONDENTS:

DNC Services Corporation/Democratic National  
Committee and Andrew Tobias in his official  
capacity as treasurer

RELEVANT STATUTES  
AND REGULATIONS:

2 U.S.C. § 431(8)(A)

2 U.S.C. § 431(11)

2 U.S.C. § 431(17)

2 U.S.C. § 434(b)

11 C.F.R. § 100.22

11 C.F.R. § 104.3

INTERNAL REPORTS CHECKED:

Disclosure Reports

OTHER AGENCIES CHECKED:

I. INTRODUCTION

This matter involves the DNC Services Corporation/Democratic National Committee ("DNC") reimbursement to the U.S. Department of Health and Human Services ("HHS") for \$2,514.50 in travel costs of HHS Secretary Kathleen Sibelius and an aide to an event where Sebelius gave a speech in which she expressly advocated the election of President Obama. The Complaint alleges that the DNC and its treasurer failed to disclose the receipt of a contribution from HHS or a debt to HHS, failed to disclose the payments to HHS as independent

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1 expenditures, and inadequately disclosed the purpose of the payments, in violation of the Federal  
2 Election Campaign Act of 1971, as amended ("the Act").

3 The DNC asserts in its Response that HHS did not make a reportable contribution to the  
4 DNC and the DNC did not incur a reportable debt to HHS, that the DNC had no role in the  
5 making of Sebelius's statements and thus bears no responsibility to disclose its payments as  
6 independent expenditures, and that the DNC adequately disclosed the purpose of its payments to  
7 HHS.

8 As set forth below, we recommend that the Commission find no reason to believe that the  
9 DNC failed to disclose a contribution or a debt or failed to adequately describe the purpose of its  
10 disbursements. We further recommend that the Commission dismiss the allegation that the DNC  
11 failed to disclose its disbursements as independent expenditures. Finally, we recommend that the  
12 Commission close the file in this matter.

## 13 II. FACTUAL BACKGROUND

14 On February 25, 2012, Sebelius spoke at a Human Rights Campaign ("HRC") gala in  
15 Charlotte, North Carolina,<sup>1</sup> in her official capacity as HHS Secretary.<sup>2</sup> In addition to her  
16 prepared remarks, Sebelius made several statements in support of President Obama's reelection  
17 and Walter Dalton's candidacy for North Carolina Governor.<sup>3</sup> Near the beginning of her speech,  
18 Sebelius recognized several individuals in attendance, including North Carolina Lieutenant

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<sup>1</sup> Compl. at 4 (Feb. 1, 2013); see also *Human Rights Campaign, Events, 2012 HRC North Carolina Gala Dinner*, <http://web.archive.org/web/20111224014449/http://www.hrc.org/events/enlry/north-carolina-annual-hrc-gala-dinner>.

<sup>2</sup> Most of the available facts are set forth in a Report by the U.S. Office of Special Counsel ("OSC") addressing complaints alleging that Sebelius violated the Hatch Act, which is attached to the Complaint. Compl., Ex. 5.

<sup>3</sup> *Id.* at 3-4.

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1 Governor Dalton; she said he "needs to be the next Governor of North Carolina."<sup>4</sup> Later in her  
2 speech, Sebelius stated:

3 [O]ne of the imperatives is to make sure that we not only come together here in  
4 Charlotte to present the nomination to the President, but we make sure that in  
5 November he continues to be President for another four years . . . .

6  
7 . . .

8  
9 [I]t's hugely important to make sure that we reelect the President and elect a  
10 Democratic governor here in North Carolina . . . .<sup>5</sup>

11  
12 Two days after the gala, HHS started receiving media inquiries about Sebelius's  
13 comments.<sup>6</sup> HHS retroactively reclassified the event as political and issued a statement that  
14 because Sebelius's trip included "political components," the federal government would not be  
15 paying for it.<sup>7</sup> HHS sought reimbursement from the DNC and the Obama for America campaign  
16 for the costs of Sebelius's travel to Charlotte for the HRC event.<sup>8</sup> Between March 9 and  
17 March 28, 2012, HHS, the DNC, and the Obama campaign communicated as to who would pay  
18 for the trip, and concluded that "the DNC will be paying for this."<sup>9</sup> The DNC disclosed a  
19 payment of \$1,003.69 to HHS on April 12, 2012, for "travel" under "Other Federal Operating  
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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Compl., Ex. 6 at 1-2.

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Expenditures,"<sup>10</sup> corresponding to Sebelius's travel costs.<sup>11</sup> The DNC disclosed a further payment of \$1,510.81 to HHS on August 2, 2012, for "travel" under "Other Federal Operating Expenditures,"<sup>12</sup> corresponding to the travel costs of an aide to Sebelius who accompanied her.<sup>13</sup>

### III. ANALYSIS

#### A. Disclosure as a Contribution and a Debt

The Complaint alleges that the DNC failed to disclose the receipt of a contribution from HHS in the form of a \$2,514.50 advance for travel costs for Sebelius and her aide.<sup>14</sup> The Complaint also alleges that the DNC failed to disclose the travel costs as debts owed to HHS until they were paid.<sup>15</sup>

The DNC asserts in its Response that HHS did not make a reportable contribution to the DNC and the DNC did not incur a reportable debt to HHS.<sup>16</sup> Specifically, the DNC claims that HHS did not provide anything of value to the DNC.<sup>17</sup> The DNC also asserts that when travel to an event is not specifically authorized or requested by a committee, the payment for such travel

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<sup>10</sup> See Compl., Ex. 8 (copy of DNC check payable to HHS); *id.*, Ex. 9 at 3 (DNC disclosure report page); DNC Amended May 2012 Monthly Report at 2660.

<sup>11</sup> See Compl., Ex. 5 at 4, Ex. 6 at 3.

<sup>12</sup> See Compl., Ex. 12 at 3 (DNC disclosure report page); DNC Amended September 2012 Monthly Report at 3027. OSC advised HHS on July 18, 2012, that there were some additional costs associated with Sebelius's attendance at the HRC event that needed to be reimbursed to the U.S. Treasury. See Compl., Ex. 5 at 4.

<sup>13</sup> *Id.*, Ex. 11. In its report, OSC concluded that Sebelius violated the Hatch Act and that HHS sought and received reimbursement from the appropriate political entities for the travel-related costs of Sebelius's appearance at the HRC event. *Id.*, Ex. 5 at 7.

<sup>14</sup> Compl. at 8.

<sup>15</sup> *Id.* at 8-9

<sup>16</sup> Resp. at 3 (Aug. 13, 2013).

<sup>17</sup> *Id.*

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1 is not a contribution.<sup>18</sup> Further, the DNC says it had no obligation to pay HHS, as the travel  
2 costs were not incurred on behalf of the DNC.<sup>19</sup>

3 Even if HHS's payment of Sebelius's travel costs provided a thing of value to the DNC,  
4 under the Act the payment would not constitute a contribution. The Act and Commission  
5 regulations require political committees to report all contributions received from any "person,"  
6 whether monetary or in-kind, during a given reporting period, as well as debts owed by such  
7 committees.<sup>20</sup> "Contribution" under the Act and Commission regulations includes any gift,  
8 subscription, loan, advance, or deposit of money or anything of value made "by any person" for  
9 the purpose of influencing any election for Federal office.<sup>21</sup> The term "person," however, "does  
10 not include the Federal Government or any authority of the Federal Government."<sup>22</sup> For this  
11 reason, the use of Federal Government funds is not a contribution, as recognized in the Act's  
12 legislative history.<sup>23</sup>

13 HHS is an authority of the Federal Government, and therefore cannot make a contribution  
14 under the Act.<sup>24</sup> Accordingly, HHS did not make and the DNC did not receive a contribution  
15 when HHS advanced \$2,514.50 in travel costs. Since there was no contribution to the DNC, the

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 2 U.S.C. § 434(b)(2)(A), (b)(3)(A), (b)(8); 11 C.F.R. § 104.3(a)(2)(i), (a)(4)(i), (d).

<sup>21</sup> 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(d).

<sup>22</sup> 2 U.S.C. § 431(11); 11 C.F.R. § 100.10.

<sup>23</sup> See H.R. REP. NO. 96-422, at 6-7 (1979), reprinted in FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1979* (1983) at 190-91; MUR 4545 (Clinton/Gore '96 Primary Committee, *et al.*) (finding even if governmental entities paid more than a reasonable portion of costs related to candidates' train travel, such payments would not have constituted excessive contributions under the Act).

<sup>24</sup> See *id.*; 2 U.S.C. § 431(8)(A)(i).

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1 DNC had no obligation to disclose either the receipt of a contribution from HHS or, to the extent  
2 the DNC had not reimbursed HHS for the alleged contribution, a debt owed to HHS. We  
3 therefore recommend that the Commission find no reason to believe that the DNC violated  
4 2 U.S.C. § 434(b)(2)(A), (b)(3)(A), or (b)(8).

5 **B. Disclosure as Independent Expenditures**

6 The Complaint also alleges that the DNC failed to disclose its payments of \$2,514.50 to  
7 HHS as independent expenditures in view of Sebelius's express advocacy in support of Obama  
8 and Dalton.<sup>25</sup> The DNC denies the allegation, asserting that it had no role in the making of  
9 Sebelius's statements and that it paid the associated expenses after the fact.<sup>26</sup>

10 The Act and Commission regulations define "independent expenditure" as an expenditure  
11 by a person expressly advocating the election or defeat of a clearly identified candidate that is  
12 not made in concert or cooperation with, or at the request or suggestion of, such candidate, the  
13 candidate's authorized political committee, a political party or their agents.<sup>27</sup> Sebelius's  
14 statements at the HRC event — "[I]t's hugely important to make sure that we reelect the  
15 President," and "[O]ne of the imperatives is to make sure that . . . in November he continues to  
16 be President for another four years" — expressly advocated the election of President Obama.<sup>28</sup>

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<sup>25</sup> Compl. at 9-10.

<sup>26</sup> Resp. at 4.

<sup>27</sup> 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

<sup>28</sup> A communication expressly advocates the election of a clearly identified federal candidate if it uses "phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in '94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters,

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1 Under the Act, political committees must itemize disbursements to persons who receive an  
2 aggregate amount of over \$200 during a calendar year in connection with an independent  
3 expenditure made by the reporting committee.<sup>29</sup> Committees shall also disclose their total  
4 independent expenditures for the relevant reporting period and calendar year.<sup>30</sup> Accordingly, a  
5 committee making payments in connection with Sebelius's express advocacy must disclose such  
6 payments as independent expenditures.<sup>31</sup> The DNC disclosed \$2,514.50 in payments to HHS as  
7 "Other Federal Operating Expenditures" rather than as independent expenditures.

8 This Office has viewed costs, including travel expenses, associated with speeches that  
9 expressly advocate the election or defeat of a clearly identified candidate to constitute  
10 independent expenditures.<sup>32</sup> Here, the likely amount of the expenditures attributable to express  
11 advocacy of a federal candidate would amount to only approximately \$1,250,

12 <sup>33</sup> Given the minimal amount

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bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'" 11 C.F.R. § 100.22(a). Here, Sebelius's statement uses the phrase "reelect the President."

<sup>29</sup> 2 U.S.C. § 434(b)(6)(B)(iii); 11 C.F.R. § 104.3(b)(3)(vii). Committees shall report such independent expenditures on FEC Form 3X Schedule E. 11 C.F.R. § 104.3(b)(3)(vii)(C).

<sup>30</sup> 2 U.S.C. § 434(b)(4)(H)(iii); 11 C.F.R. § 104.3(b)(1)(vii).

<sup>31</sup> See 2 U.S.C. §§ 431(17), 434(b).

<sup>32</sup> In MUR 5642 (Soros), OGC recommended that the Commission find reason to believe that Soros failed to report independent expenditures associated with his statements at a speaking tour that expressly advocated the defeat of President Bush and the election of Senator Kerry before the 2004 election. See First Gen. Counsel's Rpt. at 9-11, MUR 5642 (Soros). The Commission split 3-3 on OGC's recommendation. See Commission certification ¶ 1, MUR 5642 (Apr. 20, 2006); Statement of Reasons ("SOR"), Comm'rs Lenhard & Weintraub, MUR 5642 (explaining their votes against OGC's reason-to-believe recommendation); SOR, Comm'rs Mason & von Spakovsky, MUR 5642 (explaining their votes in support of OGC's reason-to-believe recommendation). The DNC cites MUR 5642 for the proposition that "the Commission has previously determined that payments for travel connected with an individual's speech do not constitute 'independent expenditures' under the Act, even if the speech contains 'express advocacy.'" Resp. at 4 n.6.

<sup>33</sup> Because Sebelius expressly advocated the election of a state candidate as well as President Obama, the \$2,514.50 would be allocated between the two candidates. See 11 C.F.R. § 106.1(a). The portions of Sebelius's speech expressly advocating the election of the state candidate and Obama were roughly equal, and so the federal

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1 of the relevant expenditures we recommend that the Commission  
2 dismiss as a matter of prosecutorial discretion the allegation that the DNC failed to disclose its  
3 disbursements to HHS as independent expenditures.<sup>34</sup>

4 **C. Disclosure of Purpose of Disbursements**

5 The Complaint alleges that even if the DNC properly categorized the payments as "Other  
6 Federal Operating Expenditures," it nevertheless insufficiently described the purpose as "travel"  
7 because the DNC failed to provide "sufficient specificity that the purpose" of the payments to  
8 HHS was "to reimburse HHS for Secretary Sebelius's violation of the Hatch Act."<sup>35</sup>

9 The DNC asserts in its Response that it properly described the purpose of its  
10 disbursements as "travel" and that the Commission has identified "travel" as a description of  
11 purpose that provides sufficient detail.<sup>36</sup>

12 The Act and Commission regulations require political committees to report the name and  
13 address of each person to whom an expenditure is made for a committee operating expense in  
14 excess of \$200 per calendar year, together with the date, amount, and purpose of the operating  
15 expenditure.<sup>37</sup> The relevant Commission regulation defines "purpose" as a "brief statement or

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portion, at 50%, would be \$1,257.25. *See id.*

<sup>34</sup> In MUR 6448 (NoTolls.com), for example, the Commission dismissed an apparent independent expenditure reporting violation where the allocated federal expenditure portion was at least \$2,194, *see* Factual & Legal Analysis at 10-11, MUR 6448,

(1985). MUR 6448. *See Heckler v. Chaney*, 470 U.S. 821

<sup>35</sup> Compl. at 10-11.

<sup>36</sup> Resp. at 4.

<sup>37</sup> 2 U.S.C. § 434(b)(5)(A); 11 C.F.R. § 104.3(b)(3)(i).

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1 description of why the disbursement was made,” and identifies “travel” as a description that  
2 meets the regulatory requirement.<sup>38</sup> “Travel” is also identified as an adequate purpose in the  
3 Commission’s Statement of Policy: “Purpose of Disbursement” Entries for Filings with the  
4 Commission,<sup>39</sup> and in the Commission’s instructions for committee disclosure forms.<sup>40</sup>

5 The available information shows that the DNC paid \$2,514.50 to HHS for the travel  
6 expenses of Sebelius and her aide, and the DNC disclosed these disbursements as “travel,” a  
7 term the Commission recognizes as adequately descriptive. Accordingly, we recommend that  
8 the Commission find no reason to believe that the DNC violated 2 U.S.C. § 434(b)(5)(A) by  
9 failing to adequately disclose its disbursements to HHS. Finally, we recommend that the  
10 Commission close the file in this matter.

#### 11 IV. RECOMMENDATIONS

- 12  
13 1. Find no reason to believe that the DNC Services Corporation/Democratic  
14 National Committee and Andrew Tobias in his official capacity as treasurer  
15 violated 2 U.S.C. § 434(b)(2)(A), (b)(3)(A), or (b)(8) by failing to disclose a  
16 contribution or a debt.  
17
- 18 2. Dismiss the allegation that the DNC Services Corporation/Democratic National  
19 Committee and Andrew Tobias in his official capacity as treasurer failed to  
20 disclose disbursements as independent expenditures in violation of 2 U.S.C.  
21 § 434(b)(4)(H)(iii) and (b)(6)(B)(iii).  
22
- 23 3. Find no reason to believe that the DNC Services Corporation/Democratic  
24 National Committee and Andrew Tobias in his official capacity as treasurer  
25 violated 2 U.S.C. § 434(b)(5)(A) by failing to adequately disclose the purpose of  
26 disbursements.  
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<sup>38</sup> 11 C.F.R. § 104.3(b)(3)(i)(A), (B).


<sup>39</sup> 72 Fed. Reg. 887, 888 (Jan. 9, 2007). The Commission also lists “travel” on its website list of “Examples of Adequate Purposes,” last updated May 30, 2012, available at <http://www.fec.gov/rad/pacs/documents/ExamplesofAdequatePurposes.pdf>.

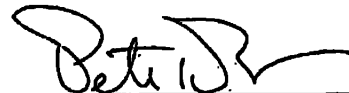
<sup>40</sup> See Instructions for FEC Form 3X and Related Schedules at 12, available at <http://www.fec.gov/pdf/forms/fecfrm3xi.pdf>.

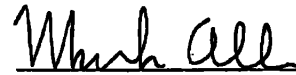
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4. Approve the attached Factual and Legal Analysis.
5. Close the file.
6. Approve the appropriate letters.

12/20/13  
Date

  
Daniel Petalas  
Associate General Counsel  
for Enforcement

  
Peter Blumberg  
Assistant General Counsel

  
Mark Allen  
Attorney

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